

**PETRA PERDANA BHD v. TENGKU DATO' IBRAHIM PETRA
TENGKU INDRA PETRA & ORS**

COURT OF APPEAL, PUTRAJAYA

ABDUL AZIZ ABD RAHIM JCA

ROHANA YUSUF JCA

PRASAD SANDOSHAM ABRAHAM JCA

[CIVIL APPEAL NO: W-02(NCC) (W)-736-04-2014]

27 AUGUST 2015

COMPANY LAW: *Directors – Breach of fiduciary duties – Allegation of wrongful divestment of company's shareholding in subsidiary company – Claim by company against ex-directors – Whether divestments made to meet urgent liquidity needs of company – Whether directors acted in breach of fiduciary and statutory duties – Whether there was conspiracy to injure company – Whether divestments were done for best interest of company – Whether conduct of directors in flagrant breach of members' resolution – Whether constituted a breach under s. 132(1) of Companies Act 1965*

The appellant ('the plaintiff') and Petra Energy Bhd ('PEB') were public listed companies. PEB was a subsidiary of the plaintiff which contributed an income of approximately RM2.34 million annually to the plaintiff. Due to financial situation of the plaintiff, the then directors of the plaintiff *ie*, the first to third appellants ('the defendants') decided to divest a substantial portion of the shareholding held by the plaintiff in PEB. Pursuant to an extraordinary general meeting ('EGM'), the shareholders of the plaintiff resolved, amongst others, that a general mandate ('the shareholders' divestment mandate') be given to the defendants to divest up to 19.5 million shares (equivalent to 10%) in PEB. Consequently, a total of four divestments were done by the defendants. The plaintiff took issue with regards to the second and third divestments. The plaintiff, *inter alia*, contended that as a result of the said divestments, it had lost its controlling block of shares in PEB and PEB ceased to be a subsidiary of the plaintiff. As such, the shares had ended up in the hands of Shorefield Resources Sdn Bhd which was controlled by one Dato' Bustari who was related to the first defendant by marriage. The plaintiff's complaint against the defendants were that, in causing the plaintiff to undertake the second and third divestments, the defendants had acted in breach of their statutory duties as set out in s. 132(1) of the Companies Act 1965 ('CA'). Further and in the alternative, the plaintiff claimed that: (i) the second and third defendants had dishonestly assisted the first defendant in the various breaches of duty owed by the first defendant to the plaintiff; (ii) the fourth defendant as an executive director of PEB, had dishonestly assisted the defendants in the various breaches of duty owed by defendants to the plaintiff, and were accessory thereto; and (iii) the first defendant to fourth defendant had conspired to injure the plaintiff *vide* the second and third divestments. The High Court Judge concluded that

- A the second and third divestments were effected for a proper purpose and there was no breach of fiduciary duties by the defendants. As such, the High Court dismissed the plaintiff's claim against the defendants. Hence, the present appeal. A cross appeal was also filed by the first defendant. The issues that arose for determination were: (i) whether the conduct of the directors, in acting the way they did, in flagrant breach of the members' resolution; and B (ii) whether this constituted a breach under s. 132(1) of the CA.

Held (allowing appeal against first, second and third defendants; dismissing appeal against fourth defendant; dismissing first defendant's cross appeal with costs)

- C **Per Prasad Sandosham Abraham JCA delivering the judgment of the court:**

- (1) The general principle is where matters are entrusted by the articles to the directors, it is not a matter where shareholders can intervene. However, under s. 132(1) of the CA, the shareholders would be empowered to seek that a decision of the board be made justiciable when D it was just to do so. Whilst the unfettered powers of the directors was encompassed in art. 115 of the plaintiff's articles of association, the shareholders' mandate at the EGM provided a barometer as to what the shareholders gauge as being the best interest of the company. This would be relevant when the directors' conduct was put under the microscope to ascertain whether they had breached s. 132(1) of the CA. (paras 18 E & 19)
- (2) As had been prescribed by the plaintiff's articles of association by virtue of art. 115, the terms that were provided by the shareholders' mandate during the EGM were the regulations that had been prescribed by F passing resolutions. The regulatory aspect of the shareholders' divestment mandate was the mode of selling and that the divesting of the plaintiff's shares in PEB would not exceed 10%. These regulations were made by way of extraordinary resolutions at the EGM, so they would constitute regulations under art. 115 of the articles of association. Since G the shareholders' mandate was renewed by the shareholders during the plaintiff's annual general meeting, the alleged board's mandate could not override the specific authority of the shareholders' mandate. (paras 25 & 26)
- (3) Despite the terms and conditions imposed under the board mandate, H there was no intention to conduct a sale *en bloc*. The intention was to divest only a substantial portion of shares to Shorefield Resources. The defendants never intended to adhere to the interest of the shareholders and eventually the party who benefited was Dato' Bustari and Shorefield Resources. All these arrangements were put into place not for the I purposes of improving the liquidity of the company of the plaintiff but instead it was an elaborate scheme to ensure that Shorefield Resources acquired a controlling interest of PEB, coming at a time when PEB had

been given a lucrative new contract. Thus, there was a breach of duty on the part of the board of directors in allowing the controlling interest of the plaintiff in PEB to be virtually stripped and the benefit of it to be passed on to Shorefield Resources. (para 35)

- (4) As a matter of law, a director was required to take into account the shareholder's view. Therefore, any sale of more than the 10% mandated by the shareholders specially a sale which resulted in PEB no longer being a subsidiary or the plaintiff losing its status as the single largest and controlling shareholder would have required shareholders' approval, which they failed to do. As such, for the appeals against the second and third defendants, since they were the directors of the plaintiff as at the third divestment, liability would be imputed on them being in breach of s. 132(1) of the CA. (paras 38 & 45)
- (5) There was no evidence linking the fourth defendant in respect of alleged conspiracy to divest the plaintiff's shares in PEB to Shorefield Resources by causing it to become the single largest, majority and controlling shareholder of PEB. Also, the ingredients of conspiracy had not been made out against the fourth defendant. Therefore, the appeal against the fourth defendant was dismissed. To prove the act of conspiracy, there must be two or more persons to do an unlawful act, or to do a lawful act by unlawful means. (para 37)
- (6) The trial judge should have examined the conduct of the board of directors to determine whether they had satisfied the duty imposed on them in law. The board of the directors had failed to give consideration to (i) consider and take into account that the second and third divestment of shares in PEB which led to the plaintiff ceasing to be the majority shareholder of PEB; and (ii) weigh the need to raise funds by sale of these PEB shares would not improve the liquidity position of the plaintiff. The plaintiff had lost a valuable investment in PEB as the plaintiff no longer controlled PEB. At the end of the day, the beneficiary of the scheme referred to the aforesaid was Shorefield Resources which was linked to the first defendant through Dato' Bustari. These were factors that should have been considered by the court before it could hold that all these were done in the best interest of the plaintiff. The failure to do so, constituted a misdirection in law which warranted appellate intervention. (para 47)

Bahasa Malaysia Translation Of Headnotes

Perayu ('plaintiff') dan Petra Energy Bhd ('PEB') ialah syarikat-syarikat tersenarai awam. PEB ialah anak syarikat plaintiff yang telah menyumbangkan pendapatan kira-kira RM2.34 juta setiap tahun kepada plaintiff. Disebabkan keadaan kewangan plaintiff, pengarah-pengarah plaintiff pada masa itu, iaitu perayu pertama hingga ketiga ('defendan-defendan'), memutuskan untuk melucutkan sebahagian besar pegangan saham yang

- A dipegang oleh plaintiff di PEB. Berikutan mesyuarat agung luar biasa ('MALB') pemegang-pemegang saham plaintiff memutuskan, antara lain, agar satu mandat umum ('mandat pelupusan pemegang saham') diberikan kepada defendan-defendan untuk melupuskan sehingga 19.5 juta saham (bersamaan dengan 10%) di PEB. Oleh itu, sejumlah empat pelupusan dibuat oleh
- B defendan-defendan. Plaintiff telah mempersoalkan pelupusan kedua dan ketiga. Plaintiff, antara lain, menghujahkan bahawa akibat pelupusan-pelupusan tersebut, ia telah kehilangan blok pengawalan saham-sahamnya di PEB dan PEB bukan lagi anak syarikat plaintiff. Oleh itu, saham-saham berakhir di tangan Shorefield Resources Sdn Bhd yang mana dikawal oleh
- C Dato' Bustari yang mempunyai pertalian dengan defendan pertama melalui perkahwinan. Aduan plaintiff terhadap defendan-defendan adalah bahawa dalam menyebabkan plaintiff membuat pelupusan kedua dan ketiga, defendan-defendan telah melakukan pelanggaran terhadap kewajipan statutori sepertimana yang tertakluk dalam s. 132(1) Akta Syarikat 1965 ('AS'). Lanjutan itu dan sebagai alternatifnya, plaintiff mendakwa bahawa:
- D (i) defendan kedua dan ketiga secara tidak jujur membantu defendan pertama dalam pelbagai pelanggaran kewajipan yang ditanggung oleh defendan pertama kepada plaintiff; (ii) defendan keempat sebagai pengarah eksekutif PBE secara tidak jujur telah membantu defendan-defendan dalam pelbagai pelanggaran kewajipan yang ditanggung oleh defendan-defendan kepada
- E plaintiff dan sekaligus menjadi aksesori; dan (iii) defendan pertama hingga defendan keempat telah berkonspirasi untuk menyebabkan kerugian kepada plaintiff melalui pelupusan kedua dan ketiga. Hakim Mahkamah Tinggi memutuskan bahawa pelupusan kedua dan ketiga telah dilaksanakan bagi tujuan yang betul dan tiada pelanggaran kewajipan fidusiari oleh defendan-defendan. Dengan itu, Mahkamah Tinggi menolak tuntutan plaintiff terhadap
- F defendan-defendan. Oleh itu, rayuan ini. Rayuan balas juga telah difailkan oleh defendan pertama. Isu yang dibangkitkan untuk pertimbangan adalah: (i) sama ada tindakan pengarah-pengarah adalah satu pelanggaran melampau resolusi ahli-ahli; dan (ii) sama ada ini merupakan pelanggaran di bawah s. 132(1) AS.
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- Diputuskan (membenarkan rayuan terhadap defendan pertama, kedua dan ketiga; menolak rayuan terhadap defendan keempat; menolak rayuan balas defendan pertama dengan kos)**
- Oleh Prasad Sandosham Abraham HMR menyampaikan penghakiman mahkamah:**
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- I (1) Prinsip umum adalah sekiranya perkara-perkara diberi kuasa oleh artikel persatuan tersebut kepada pengarah-pengarah ia bukan satu perkara di mana pemegang-pemegang saham boleh campur tangan. Walau bagaimanapun, di bawah s. 132(1) AS, pemegang-pemegang saham mempunyai kuasa untuk memastikan keputusan lembaga boleh diadili apabila ia adalah adil untuk berbuat demikian. Walaupun kuasa

- mutlak pengarah termaktub dalam per. 115 artikel persatuan plaintif, mandat pemegang-pemegang saham di MALB menjadi petunjuk tentang apa yang dianggap oleh pemegang-pemegang saham sebagai kepentingan syarikat. Ini relevan apabila tindakan pengarah-pengarah diteliti untuk menentukan sama ada mereka telah melanggar s. 132(1) AS. A
- (2) Seperti yang ditetapkan oleh artikel persatuan plaintif menurut per. 115, syarat-syarat yang diperuntukkan oleh mandat pemegang-pemegang saham semasa MALB adalah peraturan-peraturan yang telah ditetapkan dengan meluluskan resolusi. Aspek peraturan mandat pelupusan pemegang saham adalah cara pelupusan dan bahawa pelupusan saham plaintif di PEB tidak akan melebihi 10%. Peraturan-peraturan ini telah dibuat melalui resolusi luar biasa semasa MALB maka ia akan membentuk peraturan-peraturan di bawah per. 115 artikel persatuan. Memandangkan mandat pemegang-pemegang saham diperbaharui oleh pemegang-pemegang saham semasa mesyuarat agung tahunan plaintif, mandat lembaga yang didakwa tidak boleh mengatasi kuasa khusus mandat pemegang-pemegang saham. B
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- (3) Walaupun wujud terma-terma dan syarat-syarat yang dikenakan di bawah mandat lembaga, tiada niat untuk menjalankan jualan secara keseluruhan. Tujuannya adalah untuk melupuskan hanya sebahagian besar saham kepada Shorefield Resources. Defendan-defendan tidak pernah berniat untuk mematuhi kepentingan pemegang-pemegang saham dan akhirnya pihak yang mendapat manfaat ialah Dato' Bustari dan Shorefield Resources. Kesemua urusan ini telah dilaksanakan tidak bertujuan untuk memperbaiki likuiditi syarikat plaintif tetapi sebaliknya ia adalah suatu skim terperinci untuk memastikan Shorefield Resources memperoleh kawalan kepentingan PEB yang timbul pada ketika PEB telah diberi kontrak baru yang menguntungkan. Oleh itu, terdapat pelanggaran kewajipan pada pihak lembaga pengarah dalam membenarkan kawalan kepentingan plaintif di PEB untuk hampir dilucutkan dan manfaat daripadanya dipindahkan kepada Shorefield Resources. E
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- (4) Dari segi undang-undang, seorang pengarah diperlukan untuk mengambil kira pandangan pemegang saham. Oleh itu, apa-apa jualan yang melebihi 10% yang diamanahkan oleh pemegang-pemegang saham terutamanya jualan yang mengakibatkan PEB untuk tidak lagi menjadi anak syarikat atau plaintif kehilangan statusnya sebagai pemegang saham tunggal terbesar dan terkawal akan memerlukan kelulusan pemegang saham, yang mana mereka telah gagal berbuat demikian. Dengan itu, bagi rayuan terhadap defendan kedua dan ketiga, oleh kerana mereka adalah pengarah-pengarah plaintif semasa pelupusan ketiga, liabiliti akan dikenakan terhadap mereka yang melanggar s. 132(1) AS. H
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- A (5) Tiada bukti yang mengaitkan defendan keempat dengan dakwaan
B konspirasi untuk melupuskan saham plaintif dalam PEB kepada
Shorefield Resources dengan menjadikannya sebagai pemegang saham
PEB tunggal yang terbesar, majoriti dan terkawal. Selain itu, intipati
konspirasi masih belum dibuat terhadap defendan keempat. Dengan itu,
rayuan terhadap defendan keempat telah ditolak. Bagi membuktikan
tindakan konspirasi, perlu ada dua atau lebih orang untuk melakukan
tindakan salah atau untuk melakukan tindakan yang sah dengan cara
yang salah.
- C (6) Hakim bicara sepatutnya mengkaji tindakan lembaga pengarah untuk
menentukan sama ada mereka berpuas hati dengan kewajipan yang
termaktub ke atas mereka dalam undang-undang. Lembaga pengarah
gagal: (i) mempertimbangkan dan mengambil kira bahawa pelupusan
kedua dan ketiga saham dalam PEB yang menyebabkan plaintif tidak
lagi menjadi pemegang saham majoriti PEB; dan (ii) mempertimbangkan
D keperluan bagi menjana dana melalui penjualan saham-saham PEB tidak
akan memperbaiki keadaan likuiditi plaintif. Plaintif telah kehilangan
pelaburan yang berharga dalam PEB kerana plaintif tidak lagi mengawal
PEB. Akhirnya, skim benefisiari yang dirujuk adalah Shorefield
Resources yang dikaitkan dengan defendan pertama melalui Dato'
E Bustari. Faktor-faktor ini sepatutnya dipertimbangkan oleh mahkamah
sebelum ia memutuskan bahawa semua ini dilakukan demi kepentingan
plaintif. Kegagalan berbuat demikian merupakan satu salah arahan
undang-undang yang mewajarkan campur tangan rayuan.

Case(s) referred to:

- F *Australian Growth Resources Corp Pty Ltd v. Van Reesema* [1988] 13 ACLR 261 (*refd*)
Automatic Self-Cleansing Filter Syndicate Company Limited v. Cunningham [1906] 2 Ch
34 (*refd*)
Credit Development Pte Ltd v. IMO Pte Ltd [1993] 1 2 SLR 370 (*refd*)
Gramophone and Typewriters v. Stanley [1908] 2 KB 89 (*refd*)
Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Other Suits
G [2001] 8 CLJ 262 HC (*refd*)
Intraco Ltd v. Multi-Pak Singapore Pte Ltd [1994] 3 SLR (R) 1064 (*refd*)
Marshall's Valve Gear Company, Limited v. Manning, Wardle & Co. Limited [1908] 1
Ch 267 (*refd*)
Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors [1978] 1 LNS 125 FC
(*refd*)
H *Paidiah Genganaidu v. The Lower Perak Syndicate Sdn Bhd & Ors* [1973] 1 LNS 105
FC (*refd*)

Legislation referred to:

Companies Act 1965, s. 132(1)

Other source(s) referred to:

- I *Halsburys Laws of England*, 4th edn, paras 58, 1527

For the appellant - Chris Lim Su Heng (Lim Kian Leong, Tan Wei Wei & Nur Khidmah Huzaisham with him); M/s Chris Lim Su Heng

For the 1st respondent - Ben Chan (Yap Boon Hau, Philip Koh Tong Ngee & Loh Mei Ching with him); M/s Mah-Kamariyah & Philip Koh

For the 2nd & 3rd respondent - Alex De Silva (Gajendran Balachandran with him); M/s Bodipalar Ponnudurai De Silva

For the 4th respondent - Brendan Siva (Anita Krishna with him); M/s Brendan Siva

[Editor's note: For the High Court judgment, please see Petra Perdana Berhad v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors [2014] 1 LNS 236 (overruled in part).]

Reported by S Kahvitha

JUDGMENT

Prasad Sandosham Abraham JCA:

[1] This appeal arises from a decision of the High Court Kuala Lumpur on 21 March 2014, dismissing the appellant's claim against the respondents. The appellant filed an appeal to the Court of Appeal on 18 April 2014 and a cross appeal was filed on 19 June 2014.

[2] The facts material to this appeal are now set out below. For purposes of convenience, in this judgment we will refer the appellant as the plaintiff and for the respondents as the defendants in their respective numbers.

Facts Germane To This Appeal

[3] The plaintiff is a public listed company. Petra Energy Berhad ("PEB") is also a public listed company and was a subsidiary of the plaintiff. PEB was the "jewel in the crown" of the plaintiff contributing an income of approximately RM2.34 million annually (cash flow as in the Board Mandate on 18 November 2009) to the plaintiff (a fact not in dispute). Due to the financial situation of the plaintiff ie, repayment to bond holders or/and restrictive cash flow, the directors of the plaintiff (first, second and third defendants) decided to take certain commercial measures to ease the financial difficulties that the plaintiff faced. The only marketable asset that the plaintiff could use to raise funds was its shares in PEB. As PEB was pivotal for the income base of the plaintiff and any disposal of shares of PEB would have a material effect on the financial position of the plaintiff, the directors decided to put their proposals to an EGM of shareholders for the said shareholders' approval.

[4] Prior to its listing, PEB was a wholly owned subsidiary of the plaintiff. The first to third defendants (now referred to as "board of directors") were the previous directors of the plaintiff (up to the time of the Third Divestment), and were also the directors of PEB. The fourth defendant was the executive director of PEB and had resigned as a director of PEB sometime on or around 18 June 2010. (See p. 356 Rekod Rayuan Jilid 1(2) Bahagian A).

- A [5] Pursuant to an extraordinary general meeting (“EGM”) convened on 26 February 2007, the shareholders of the plaintiff resolved amongst others that a general mandate be given to the plaintiff to divest up to 19.5 million shares (equivalent to 10%) in PEB after its listing on the Main Board of Bursa Malaysia (see pp. 2172-2173 Rekod Rayuan Jilid 2(9) Bahagian C).
- B [6] The Shareholders’ Divestment Mandate was subject to an announcement by the plaintiff to Bursa Malaysia on 26 February 2007. This Shareholders’ Divestment Mandate was also renewed on an annual basis by the shareholders of the plaintiff in general meeting and such renewals were also the subject matter of various announcements by the plaintiff to Bursa
- C Malaysia (see pp. 2174-2178 Rekod Rayuan Jilid 2(9) Bahagian C).
- [7] On or about 10 December 2007, the plaintiff through its board of directors divested 9 million ordinary shares which it held in PEB to Lembaga Tabung Haji (“First Divestment”). The plaintiff’s shareholding in PEB was reduced from 64.62% to 60% by reason of this divestment.
- D [8] At a board of directors’ meeting on or about 26 August 2009, the board of directors of the plaintiff resolved to divest further of the plaintiff’s shares in PEB to meet the cash requirements of the plaintiff’s group and authorised the first defendant to negotiate and finalise the price and sale of such shares. (See pp. 2795-2801 Rekod Rayuan Jilid 2(12) Bahagian C).
- E [9] It was pursuant to the Second Divestment that the plaintiff divested 10.5 million ordinary shares in PEB to TA First Credit on 10 September 2009 (“Second Divestment”) on the terms negotiated by the first defendant. (See p. 2807 Rekod Rayuan Jilid 2(12) Bahagian C). The plaintiff’s
- F shareholding in PEB was reduced further to 54.62% by reason of this divestment. TA First Credit had in turn disposed of these shares under the Second Divestment to a company known as Shorefield Resources Sdn Bhd (“Shorefield Resources”). Shorefield Resources is and was controlled by Datuk Bustari Yusof who is related to the first defendant by marriage (see p. 1340 Notes of Proceedings dated 23 January 2013).
- G [10] At a board of directors meeting of the plaintiff that was convened on 18 November 2009, it was resolved that the plaintiff divests its remaining 54.62% shareholding in PEB to meet the plaintiff’s cash flow requirements upon terms which included as follows (Third Divestment):
- H a. The shares would be sold *en bloc*;
- b. By way of an open tender;
- c. Through the appointment of placement agents or advisors;
- I d. Subject to the availability of an independent valuation of the PEB shares in question;

- e. Procuring a minimum net proceeds of RM1.80 per PEB share;
- f. In compliance with the rules and regulations required;

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(See pp. 2938-2956 Rekod Rayuan Jilid 2(13) Bahagian C).

[11] On 22 December 2009 ("December Board Meeting"), the board of directors resolved that 29.59% shareholding in PEB be disposed of in 2 tranches (Fourth Divestment). However this divestment was never proceeded with as an injunction was obtained by Encik Shamsul bin Saad (a shareholder, as well as an executive director of the plaintiff) to restrain dealings with the said shares. (See pp. 569 Rekod Rayuan Jilid 1(3) Bahagian A).

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[12] The resolution of the shareholders passed at the EGM dated 26 April 2007 remains in effect and has been renewed on 26 June 2008 and 25 June 2009. (See pp. 103-117 Ikatan Teras Bersama (Ikatan Dokumen) Jilid 1).

The Plaintiff's Claim

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[13] The plaintiff takes issue with regards to the two particular divestments of the plaintiff's shares in PEB ie, the Second and Third Divestment.

[14] In this regard, the plaintiff contends that:

- a) in causing the plaintiff to undertake the Second Divestment and the Third Divestment, the first to third defendants had acted in breach of their statutory duties as set out in s. 132(1) of the Companies Act (CA);
- b) further and/or in the alternative, the second and third defendants had dishonestly assisted the first defendant in the various breaches of duty owed by first defendant to the plaintiff, and were accessories thereto;
- c) further and/or in the alternative, the fourth defendant as director of PEB, had dishonestly assisted the first to third defendants in the various breaches of duty owed by first to third defendants to the appellant, and was accessory thereto;
- d) first defendant to fourth defendant had conspired, whether by lawful and/or unlawful means, to injure the plaintiff *vide* the Second Divestment and the Third Divestment; and
- e) as a result of the aforesaid acts or omissions, the plaintiff had suffered loss and damage in relation to both the Second Divestments and the Third Divestment.

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Defendants' Reply

[15] The defence of the first to third defendants is that they did, in authorising and effecting the two impugned divestments of shares in PEB, had acted at all material times pursuant to the mandates of the board of directors collectively arrived at in August and November 2009. They

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- A maintain that they did, at all times act *bona fide* in the interests of the plaintiff when effecting such divestments which were duly authorised by the board. In essence they point to the fact that the dominant purpose of such divestments was to meet the urgent liquidity needs of the plaintiff and to assuage its dire cash flow position because:
- B (i) The plaintiff was at the time in a tight liquidity position;
- (ii) There was threatened litigation by creditors, particularly one Shin Yang Shipyard;
- (iii) The plaintiff had, for the first time in its corporate history, made a loss of approximately RM8.9 million in the third quarter of 2009; and
- C (iv) The plaintiff was unable to obtain funds expeditiously through other means.

D [16] The first to third defendants maintain that they duly discharged their fiduciary and statutory duties as directors of the plaintiff with regards to these disputed divestments. They point to the fact that they relied on professional advisors in carrying out these transactions.

E [17] As for the plea of conspiracy, the first to third defendants and the fourth defendant deny the same absolutely, maintaining that there was never at any point of time any agreement arrived at between them and/or others to injure the plaintiff. They deny the existence of any scheme designed to injure the plaintiff by causing the divestment of its “crown jewel”, namely PEB.

Issues To Be Dealt By The Court

- F [18] The company is made up of two main components ie, the board of directors and members in general meeting. The general principle is where matters are entrusted by the articles to the directors, it is not a matter where shareholders can intervene. The effect of the demarcation of powers between the board of directors and members in general meeting has been well
- G illustrated in the case of *Automatic Self-Cleansing Filter Syndicate Company Limited v. Cunningham* [1906] 2 Ch 34. There, the articles of the company expressly empowered the directors to sell any property of the company on such terms and conditions as they might think fit. A resolution was passed by the company directing the board to sell the company’s property to a new
- H company formed for that purpose. It was held that the directors were not bound to carry into effect the resolution passed by the general meeting. The Court of Appeal was urged to use the analogy of principal and agent, in that it would be absurd thing if a principal in appointing an agent should in effect appoint a dictator who is to manage him, instead of his managing the agent.
- I The argument was rejected by Collins MR, where the Master of the Rolls stated that such an analogy did not strictly apply to that case, and added:

No doubt for some purposes directors are agents. For whom are they agents? You have, no doubt, in theory and law one entity, the company, which might be a principal, but you have to go behind that when you look to the particular position of directors. It is by the consensus of all the individuals in the company that these directors become agents and hold their rights as agents. It is not fair to say that a majority at a meeting is for the purposes of this case the principal so as to alter the mandate of the agent. The minority also must be taken into account. If the mandate of the directors is to be altered, it can only be under the machinery of the memorandum and articles themselves.

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The main reason for the division of powers between directors and members was explained by Buckley LJ in *Gramophone and Typewriters v. Stanley* [1908] 2 KB 89, at p. 105-6 in this way:

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... even a resolution of a numerical majority a general meeting of the company cannot impose its will upon the directors when the articles have confided to them the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles.

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[19] However the classical position as set out above has been varied by legislation, for instance s. 132(1) of the CA; and it is our view that under certain given circumstances the shareholders would be empowered to seek that decision of the board be made justiciable when it was just to do so. In this case it is not the resolution of the board or the members in the EGM which is being challenged *per se* but the conduct of the directors in acting the way that they did in flagrant breach of the members' resolution and whether this constituted a breach under s. 132(1) of the CA. In *Australian Growth Resources Corp Pty Ltd v. Van Reesema* [1988] 13 ACLR 261, the South Australian Supreme Court in considering the Australian equivalent to s. 132, held that the statutory duty to act honestly encompassed in it the fiduciary duties of acting in the interests of the company and to act for proper purposes.

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[20] The main argument by the plaintiff in that Australian case was that the Shareholders' Mandate prevails over the Board's Mandate. Article 115(1) of the plaintiff's Articles of Association in the instant appeal provides as follows:

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The business of the Company shall be managed by, the directors who may exercise all such powers of the Company, and do on behalf of the Company all such acts as are within the scope of the Memorandum and Articles of Association of the Company and as are not, by the Act or by these regulations, required to be exercised by the Company in general meeting, subject, nevertheless to any of these regulations, to the

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- A provisions of the Act, and to such regulations, **being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the Company in general meeting**, but no regulation made by the Company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made. (emphasis added)
- B [21] The learned High Court Judge ruled (at p. 232 of the Rekod Rayuan) that:
- C 347. As such the General Shareholders' Mandate is not a 'regulation' within the meaning of Article 115 and cannot limit the existing power of the directors as provided under Article 115. Put another way, the reference in Article 115 to "regulations" therefore means regulations as envisaged under the Companies Act, and not resolutions passed in general meeting.
- D [22] Whilst the unfettered powers of the directors is encompassed in art. 115, it is our view that that the shareholder's mandate at the EGM provides a barometer as to what the shareholders gauge as being the best interest of the company. This would be relevant when the directors' conduct is put under the microscope to ascertain whether they had breached s. 132(1) of the CA.
- E [23] The plaintiff had referred to us the case of *Credit Development Pte Ltd v. IMO Pte Ltd* [1993]1 2 SLR 370 where the shareholder of the plaintiff company sent written requisitions to the plaintiff setting out seven resolutions it wanted moved at the next annual general meeting of the plaintiff. The plaintiff however, declined to include the resolutions in the agenda of the next annual general meeting on the basis that the matters in the resolutions came within the purview of the directors and a general meeting
- F was not the proper forum to deliberate on them. Article 88(1) of the Articles of Association of the Company, is almost identical with art. 115(1) of the plaintiff's Articles of Association. The learned judge, Lim Teong Qwee JC had at pp. 377 and 378 of the report stated that and we agree:
- G II 'subject nevertheless to the provisions of the statutes, these articles and to **such regulations ... as may be prescribed by the company in general meeting** (emphasis added).
- H These words of limitation come after the vesting of the management of the business in the directors and granting to them the powers and I think it means that both the management of the company's business and the exercise of the company's powers are subject to the condition. *In the management of the business and the exercise of the powers the directors must comply with the statutes and the articles for the time being in force. They must also comply with such regulations as may be prescribed by the company in general meeting. This means that although the directors are to manage the company's business and may exercise all the company's powers yet the company in general meeting may at any time prescribe regulations which the directors must comply with.*
- I Such regulations can only be prescribed by passing resolutions which would include resolutions for the appointment of

accountants and solicitors for the purposes set out in the requisition of IMO. When such resolutions are passed, what the company in general meeting is saying to the directors is 'Appoint accountants and solicitors for these specific purposes. Subject to that you manage the company's business and exercise all the company's powers'. (emphasis added)

A

[24] The abovementioned case had distinguished the cases referred to by the learned trial judge in our instant appeal wherein the cases must be read in the context of the articles of association of the company in question. The shareholders may by special resolution direct the directors to take or refrain from taking specified action.

B

[25] Based on the abovementioned case, the articles of association of a company are the regulations of the company. As been prescribed by the plaintiff's articles of association by virtue of art. 115 ie, "... being not inconsistent with the aforesaid regulations or provisions as may be prescribed by the company in general meeting", the terms that were provided by the Shareholders' Mandate during the EGM are the regulations that has been prescribed by passing resolutions and thus the directors must comply with the mandate as prescribed by the company's articles of association.

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[26] The Shareholders' Mandate was subsequently renewed by the shareholders during the plaintiff's annual general meeting held on 26 June 2008 and 25 June 2009 respectively. Therefore, the alleged Board's Mandate could not override the specific authority of the Shareholders' Mandate.

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[27] The defendants on the other hand stated that the Shareholders' Divestment Mandate does not deprive the plaintiff's board of directors of its power to deal with the plaintiff's shares in PEB in accordance with the law and the plaintiff's Memorandum and Articles of Association.

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[28] A valid resolution ie, the Shareholders' Mandate was given to the board of directors during the extraordinary general meeting of the plaintiff allowing the board of directors to dispose up to 10% shares held in PEB, upon the following terms ("Shareholders' Divestment Mandate"):

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i. That the divestment is for cash consideration through the open market and/or placement/s at such time/s as Petra Perdana's directors may in their discretion deem fit provided that the price/s shall not be more than 10% discount of the 5-day weighted average market price/s (WAMP) of the ordinary shares of par value RM0.50 each in PEB preceding the relevant date/s of the divestment/s;

H

ii. *That the board of directors of Petra Perdana would endeavour to, inter alia, secure the best possible price/s for the PEB shares after taking into consideration the prevailing equity market conditions and sentiments in the best interests of Petra Perdana.* (emphasis added)

I

A [29] The rationale for the Shareholder's Divestment Mandate was to enable
the plaintiff to effect the divestment of 19.5 million ordinary shares in PEB
(representing 10% of PEB's shareholding) or any part thereof at the
opportune time in the event of improving equity market conditions and to
eliminate the need to convene separate general meetings whenever applicable
B to obtain shareholders' approval for the divestment of such shares. The
Shareholder's Divestment Mandate would enable the plaintiff to raise
additional funds expeditiously as and when it was required without having
to obtain approval at a general meeting.

C [30] In this case the regulatory aspect of the same were the mode of selling
and that the divesting of the plaintiff's shares in PEB would not exceed 10%.
These regulations were made by way of extraordinary resolutions at the
EGM, so they would constitute regulations under art. 115 and we therefore
are not in agreement with the learned judge on the point. In the case of
Marshall's Valve Gear Company, Limited v. Manning, Wardle & Co. Limited
D [1908] 1 Ch. 267, Justice Neville J took this approach (and we agree) and
we quote at p. 268 and 273-274:

E The powers of the directors were regulated by art. 55 of Table A, which
provides: "The business of the company shall be managed by the
directors, who may pay all expenses incurred in getting up and registering
the company, and may exercise all such powers of the company as are not
by the foregoing Act, or by these articles, required to be exercised by the
company in general meeting, subject nevertheless to any regulations of
these articles, to the provisions of the foregoing Act, and to such
regulations, being not inconsistent with the aforesaid regulations or
provisions, as may be prescribed by the company in general meeting ..."

F ...

G If I am right in this conclusion, it is obvious, I think, *that I ought not to*
interfere with the progress of the present action, because it is brought with the approval
of the majority of the shareholders in the company, and, upon the decisions which
I have referred to, they are the persons who are entitled to say, aye or no, whether
the litigation shall proceed. In the present case there is no difficulty about the
articles of association, because there is no unusual contract between the
members of the company with regard to the powers of the directors,
although there is with regard to the continuation of their office; but *the*
powers of the directors are regulated by art. 55 and simply state the relation existing
between the directors and the company as a general body, and I think that under
H *art. 55 the majority of the shareholders in the company at a general meeting have*
a right to control the action of the directors, so long as they do not affect to control
it in a direction contrary to any of the provisions of the articles which bind the
company. I think, therefore, the motion in the present case fails and must
be dismissed with costs. (emphasis added)

I [31] Despite the regulations set out by the shareholders in the mandate with
regards to the discount in respect of the shares not exceeding 10% in the
Second Divestment, the first defendant had caused 10.5 million ordinary

PEB's shares at par value RM0.50 each to be transferred to TA First Credit who in turn on 27 October 2009 disposed of 9.7 million shares out of the 10.5 million ordinary shares of PEB shares at RM1.80 per share making a profit of approximately RM2,600,000 in favour of TA First Credit. The end buyer in the Second Divestment was Shorefield Resources. Bearing in mind that the purpose of this Second Divestment was to improve the liquidity position of the plaintiff, could it be then said disposing of PEB shares at par value under the Second Divestment, be acting in the best interest of the plaintiff taking into account the profit TA First Credit made in selling the said shares to Shorefield Resources?

[32] In respect of the Third Divestment it was very clear that it had breached the mandate of the EGM in that the plaintiff's controlling interest in PEB would be completely divested despite the stipulation in the said mandate against such divestment. However by the board of directors meeting convened on 18 November 2009 it was resolved that the plaintiff divest its remaining 54.62% shareholding in PEB (see pp. 142-160 *Ikatan Teras Bersama* (*Ikatan Dokumen*) Jilid 1). In this regard we find that the Third Divestment was not *bona fide* and/or in the best interest of the plaintiff as it was conducted by the directors in breach of s. 132(1) of the CA, which must be examined based on the following facts:

- 1) The relationship between Shorefield Resources and the first defendant. This fact may be extracted from the evidence given by the first defendant in the course of the trial:

Q: You look at Answers to Questions 12,13,14. Very clear — Shorefield Resources; due diligence. And this was evidence of the Plaintiff's witnesses. Now, Tengku, Shorefield Resources, do you know- is controlled by Datuk Bustari Yusof?

A: Yes

Q: Datuk- Bustari Yusof, in your witness statement DW4, is related to you by marriage.

A: Related distantly, My Lady My nephew is married to Tan Sri Mohd Kamal's daughter. And Datuk Bustari's daughter is married to – Tan Sri's son. So that's how I said by in-law.

Q: Sure. You've explained the relationship. Now, I'm going to ask you this question for formality. You agree with me you know of this relationship before- Ernst and Young conducted- the due diligence- before May 2009, yes or no?

A: What relationship are you referring to?

Q: The one you explained

A: Yes

(Notes of Proceeding dated 23 January 2013)

A This evidence clearly point to the fact of the relationship between the first defendant and Dato' Bustari who is the shareholder of Shorefield Resources.

2) Who advice the plaintiff to enter into the divestment despite the Shareholder's special resolution?

B On or about 18 November 2009, the first defendant, issued a letter (see p. 251 Ikatan Teras Bersama (Ikatan Dokumen) Jilid 1) on behalf of the plaintiff appointing TA Securities as an exclusive placement agent of the shares which the plaintiff held in PEB ("Placement Agent Appointment") to ascertain the "fair valuation of PEB shares". TA
C Securities had in return furnished the "Fairness Consideration Report" dated 30 November 2009 to the first defendant. Nevertheless this report was not extended to the board of directors of the plaintiff for deliberation and discussion. On 11 December 2009, TA Securities confirmed that 25.3% of the PEB shares had been sold to Shorefield
D Resources at RM1.91 per share through a direct business transaction (see pp. 3045 Rekod Rayuan Jilid 2(14) Bahagian C).

[33] The disposal of shares was not *bona fide* in the interest of the plaintiff and the series of emails between PW7 (agent of TA Securities) and first
E defendants showed that they never intended to adhere the interest of the shareholders especially during the Third Divestment. The emails indicating this are as follows:

a) On 22 November 2009, the conversation between PW7 and the first
F defendant that took place *vide* e-mails showed that the sale of the PEB shares would be conducted by way of a direct approach and negotiation method. He said this in his email and we quote:

Richard,

Point taken. *I supposed if you show and prove that several genuine parties were invited to negotiate and put in their bids, that itself constitute a "tender".*

G What we want to avoid is to be accused that the shares were placed out proportionately to two or three parties without any kind of "bids". In this case you must invite a minimum of 6 to 8 parties for the process to work ... am I right?

Thanks for the positive kick ass attitude Richard!!

H ...

All your board members including your goodself are fully covered as the placement mandate clearly gives me the discretion as to what is the best placement method to use I stress that you and your board members cannot be accused of not using the tender
I process since the responsibility solely lies on me.

(see pp. 7500 Rekod Rayuan Jilid 2(36) Bahagian C)

b) On 22 November 2009, the first defendant replied PW7 via email. He was worried about being accused of rigging the tender and of having placed the shares. Hence the first defendant instructed PW7 to make sure that the process must appear to be through an open tender:

... I supposed if you show and prove that several genuine parties were invited to negotiate and put in their bids, that itself constitute a 'tender'.

(see pp. 7500 Rekod Rayuan Jilid 2(36) Bahagian C)

On 22 November 2009, PW7 replied *via* email:

... Pricing is not the sole criteria as speed is equally crucial. Thus the fastest bidder has a good chance of beating the highest bidder. Those who insist on doing due diligence will be first to be knocked out.

(see pp. 7498 Rekod Rayuan Jilid 2(36) Bahagian C)

On 28 November 2009, PW7 said this in his email:

... *We will impose a closing date of 12pm 4th Dec. for responses to the invitation-let them scramble to meet this dateline. If they can't meet this timeline, I will simply abort the "tender" and then directly place out the shares to DB (Dato' Bustari).* I doubt anyone else can respond by 4th Dec so there will be a good reason to abort the "tender" and resort to direct placement. As for the smaller block, I've arranged for 54% financing but if DB (Dato' Bustari) is unable to fund the 46% balance, what do you think of using an Aussie listed company as a nominee? ...

(see pp. 7503 Rekod Rayuan Jilid 2(36) Bahagian C)

On 30 November 2009, PW7's emailed:

A possible solution is to reduce the deposit to 5% and ask DB (Dato' Bustari) to pay himself by this Friday ... We also get him to bid for 25% and then we deal with the balance of 6% at a later stage ... I recall Zaidee saying that DB has more than RM10 million cash reserved for this deal. Please let me know what you think of this strategy. It would be good if you or Robert (R4) can persuade DB to agree. I can also call him direct to convince him if you like. You can call DB on this directly. (emphasis added)

(see pp. 7502 Rekod Rayuan Jilid 2(36) Bahagian C)

[34] The emails showed that there was a concerted effort to divest PEB shares to Dato' Bustari's company ie, Shorefield Resources. The board of directors in particular the first defendant in deciding to approve the Third Divestment and push it through, smacks of a case of impetuosity and a total disregard of relevant facts and in particular the divestment mandate. The board of directors had not acted *bona fide* in the interest of the plaintiff but

A were driven to take steps that place Shorefield Resources, the principal beneficiary of these arrangements. It appeared that strict terms were imposed so as to eliminate potential bidders and yet terms would be adjusted to favour Dato' Bustari.

B [35] It is clear that despite the terms and conditions imposed under the board mandate dated 18 November 2009, there was no intention to conduct a sale *en bloc*. The intention was to divest only a substantial portion of shares to Shorefield Resources. They have never intended to adhere to the interest of the shareholders and eventually the party who benefited was Dato' Bustari and Shorefield Resources. All these arrangements were put into place not for
C the purposes of improving the liquidity of the company of the plaintiff but instead it was an elaborate scheme to ensure that Shorefield Resources acquired a controlling interest of PEB, coming at a time when PEB had been given a lucrative new contract from Shell by Sarawak Shell Berhad and Sabah Shell Petroleum Company Ltd (see pp. 64-66 first respondent's core bundle).
D Thus there was a breach of duty on the part of the board of directors in allowing the controlling interest of the plaintiff in PEB to be virtually stripped and the benefit of it to be passed on to Shorefield Resources.

E [36] Furthermore DW3, the Head of Corporate Finance in Affin Investment Bank Berhad testified that he was not given the exact terms of the conditional mandate of the board dated 18 November 2009 (see p. 1289 Rekod Rayuan Jilid 2(4) Bahagian C). He was told that the cash was required urgently (see pp. 1282-1283 Rekod Rayuan Jilid 2(4) Bahagian C). He was also not informed that PEB shares were pledged and the amount of loan underlying thereto. The evidence of DW3 are as follows:

F Q187. So you were, so you were briefed as to these terms and conditions? I want to be clear, what it's you were told and what it's you were not told. This is the actual Board mandate.

A: Yes. I didn't see the mandate but I was basically informed on what were the conditions imposed by the Board.

G Q188. So you knew that the Board mandated a sale *en bloc* basis? And you were told that?

A: Yes, *en bloc* by way of tender or by way of tender, yes I was told that.

H Q189. You were told that, but your advice goes in to say that you can sell staggered basis, options 2. So if you knew the Board only mandated the sale *en bloc*, how come your advice got two options? It's contrary to the Board minute

A: To be clear, I wasn't present in the Board meeting, so whether I fully understood.

I Q190. No, that not what I'm saying Encik Johan, I'm just trying to make away out to say what was it told to you. You said you were told *en bloc*, you knew

- A: The meeting was few years ago, I cannot remember the exact you know. But I think what I'm trying to say, to make very clear. I was given certain perimeters and asked to comment on it, that is. But you are trying to bill in other factors. **A**
- ...
- DW3: So basically my recollection was that D1 and D2 told me that the Board had basically approved to proceed basically with the sale of the shares and I think the option that they are looking at were either a sale on *en bloc* basis or in tranches. What I do recall is that there was also a mention about valuation to be done. I believe it was done by TA Securities in that sense. And of course I think the one about any disposal must be in compliance with any of the rules which is where I suppose to come in, in relation to my input. **B**
- Q193. But you confirm that D2 and D3 told you that Board resolution list out they could either do it *en bloc* or tranches. **C**
- A: No, I think I was told the Board resolute itself and the options that were open to them were actually to sell it *en bloc* or tranches and we were asked to look at the.. **D**
- Q194. Correct, and that was told to you by D2 and D3, correct?
- A: Yes yes **E**
- ...
- Q196. And basically this was told to you at this second meeting you confirm D2 and D3 on 20th November 2009?
- A: Yes. **F**
- Q197. Encik Johan, you also didn't ask the D2 and D3 what were the specific terms or ask for a copy of the Board resolution?
- A: I did not think it was necessary because we are just asked to provide some initial view to the compliance.
- Q198. Encik Johan, would you agree with me that the terms and conditions of the Board resolution, mandating the proposed disposal of the PEB's shares is a material and relevant factors for you to formulate your views and advise? **G**
- A: I will not say that it's actually a very material factor. I think because we were only asked to comment on the options, we were not asked to comment on process meaning you should have gotten whatever approval or complied with whatever conditions by the Board. So I think, I look at it as in that sense. Then no, it would not be something relevant for us. **H**
- Q199. No at that time, you didn't think it was relevant because you were told specifically by D2 and D3, correct? The Board resolved, these are the options, there are two options either to sell it *en bloc* **I**

A or in tranches, can you please tell us which is the better one?
Correct, that was essentially what was D2 and D3 told you, am
I correct?

A: Yes.

(Notes of Proceeding dated 22 January 2013)

B [37] Whilst the evidence shows also a conspiracy between the board of
directors and sixth and seventh defendants, to divest the plaintiff's shares in
PEB to Shorefield Resources by causing it to become the single largest,
majority and controlling shareholder of PEB, but as the present appeal is not
C being proceeded with against the sixth and seventh defendants, the matter
rests there. We also find no evidence linking the fourth defendant in respect
of alleged conspiracy, and the ingredients of conspiracy had not been made
out against the fourth defendant. And we are therefore of the view the appeal
against the fourth defendant should be dismissed. To prove the act of
D conspiracy there must be two or more to do an unlawful act, or to do a lawful
act by unlawful means. *Halsburys Laws of England* (4th edn) at para 1527,
states that the essential ingredients of conspiracy are (1) an agreement
between two or more persons, (2) an agreement for the purpose of injuring
the plaintiff, and (3) that acts done in execution of that agreement resulted
in damage to the plaintiff. It is not enough that two or more persons pursued
E the same unlawful object at the same time or in the same place; it is necessary
to show a meeting of minds, a consensus to effect an unlawful purpose though
it is not necessary that each conspirator should have been in communications
with each other (*11 Halsburys Laws* (4th edn) para 58). In *Industrial Concrete*
Products Bhd v. Concrete Engineering Products Bhd & Other Suits [2001] 8 CLJ
F 262 the learned judge Justice James Foong (as he then was) held at pp. 296
and 297 as follows:

In order for this claim to succeed, [the claimant] must establish:

(a) a combination of the defendants; (b) to effect an unlawful purpose;
(c) resulting to the damage to the plaintiff (*Crofter Hand Woven Harris Tweed*
G *Co Ltd v. Veitch* per Lord Simon LC). The classic definition of conspiracy
is that in *Mulcahy v. R*:

A conspiracy consists not merely of the intention of two or more, but in
agreement of two or more to do an unlawful act, or to do a lawful act
by unlawful means.

H I have used the word 'combination' rather than the word 'agreement'
used in that definition and by Lord Simon LC, because the word
'agreement' in this context does not mean an agreement in any
contractual sense but a combination and common intention to do the act
which is the object of the alleged conspiracy.'— per Buckley LJ in *Belmont*
I *Finance v. Williams Furniture (No 2)* [1980] 1 All ER 393 at p 403.

Thus, in the tort of conspiracy there must be an agreement or 'combination' of two or more with the common intention to effect an unlawful purpose or to do a lawful act by unlawful means, resulting in damage to the plaintiff.

A

Wan Suleiman FJ in *Mrs Kok Wee Kiat v. Kuala Lumpur Stock Exchange Bhd & Ors* [1978] 1 LNS 125; [1979] 1 MLJ 71 define conspiracy as "A conspiracy consists ... in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means."

B

[38] For the reasons in law and on the facts stated above, the appeal against the fourth defendant should stand dismissed. As for the appeals against the second and third defendants as they were the directors of the plaintiff as at the Third Divestment, liability would be imputed on them being in breach of s. 132(1) of the CA and it would follow that the appeals against the first, second and third defendants would be allowed.

C

[39] The board of directors contended that they have properly exercised their duties and have acted in its best interest to the company. They had addressed their mind to *inter alia* the following matters in coming to a decision to dispose substantially the plaintiff's shareholding in PEB in:

D

- a) That the plaintiff group was faced with a threatened lawsuit by Shin Yang Shipyard Sdn Bhd in respect of the failure to pay for the balance sum of the vessel, "Petra Galazy";
- b) That the plaintiff group had no surplus cash to pay for "Petra Galazy";
- c) That the plaintiff group was operating under very tight cash flow condition;
- d) That it was difficult for the plaintiff group to obtain alternative financing given the circumstances at the time; and
- e) That the disposal would address the loans taken by the plaintiff.

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(See pp. 2795-2801 Rekod Rayuan Jilid 2(12) Bahagian C).

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[40] The question to be asked and should have been asked by the learned trial judge was whether the Second and Third Divestment was in the best interest of the plaintiff. The plaintiff's shares in PEB has been reduced to 29.59% from 54.62% after the Third Divestment thus ceased to be the single largest and controlling shareholder of PEB.

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[41] The learned High Court Judge had concluded that the Second and Third Divestments were in fact effected or transacted for a proper purpose and there's no breach of fiduciary duties by the defendants, ie, *bona fide* in the best interests of the plaintiff (at p. 222 of the Rekod Rayuan):

325. As such the finding of this Court is that both the Second and Third Divestments were undertaken by, *inter alia*, Tengku Ibrahim, Lawrence Wong and Tiong as directors of the Plaintiff at the material time, for a

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A proper purpose. To that extent therefore they acted *bona fide* in the best
interests of the company. I am satisfied that with respect to each of these
directors, there is insufficient evidence to show that there was a clear
consciousness on their part that what they were doing was not in the
interests of the Plaintiff and that they nonetheless acted deliberately to
B sell the PEB shares in disregard of that knowledge. As the full scope of
the facts reveals, if their plan to sell the entirety of the PEB shares had
been allowed to come to fruition, the Plaintiff would have resolved its
cash flow problems. However this was not to be as Shamsul injunctioned the
further sale of the PEB shares. The purpose of the sale was therefore
never achieved. In these circumstances it cannot be said that these three
C directors had acted to the detriment of the Plaintiff. On the contrary they
genuinely believed that they were acting in the best interests of the
company.

[42] What is the meaning of the phrase '*bona fide* for the benefit as a whole'?
The (then) Supreme Court had occasioned to observe on the meaning of '*bona
fide* for the benefit of a company as a whole in *Paidiah Genganaidu v. The
D Lower Perak Syndicate Sdn Bhd & Ors* [1973] 1 LNS 105; [1974] 1 MLJ 220.
Ali FJ, delivering the judgment of the court said, at p. 221:

E The expression "*bona fide* for the benefit of the company as a whole" in
the context stated would seem to mean something more than writing off
bad debts as in this case. What is beneficial to the company as a whole
is usually a matter for the shareholders decide. Largely it is a matter of
opinion. Where opinions differ, as might well be the case here, the
F opinion of the majority must, of course, prevail. This is because the
minority have by their contract with the company agreed to submit, to the
will of the majority. In the instant case and other similar cases it is not
always easy to know a fact whether or not a particular resolution is or is
not *bona fide* for the benefit of the company as a whole in order to
establish that it is fraud on the minority. (emphasis added)

[43] In *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd
& Other Suits (supra)* where Justice James Foong J (as he then was) at p. 288
G sets out the primary duty of a director:

a director shall at all times act honestly and use reasonable diligence in
the discharge of his duty of his office" and this is "in addition to and not
in derogation of any other written law or rule of law relating to duty or
liability of directors or officers of a company." Section 132 of the
Companies Act.

H Regarding the extent of the meaning of "honesty" the case of *Multi-Pak
Singapore Pte Ltd v. Intraco Ltd* [1994] 2 SLR 282 explains that this does not
mean that the director had not acted fraudulently; it means that he must act
bona fide in the interest of the company and that in exercising his discretion, the
director should act only to promote and advance the interest of the company.

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Elaborating on this, Cohen J of the New South Wales Supreme Court in the case of *Blackwell v. Moray* [1991] 5 ACSR 255, expresses that:

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A mere general sense of honesty of purpose is not in my view sufficient to satisfy the requirements that a director act *bona fide* for the benefit of the company. It requires at least a consideration of the views or of relevant material in order that he may act in a *bona fide* way. The abandonment of any proper consideration of relevant facts, the admitted failure to exercise an independent discretion and the mere doing of what was thought that the majority shareholder wanted cannot in these circumstances have amounted to the *bona fide* exercise of discretion required of a director.

B

Justice Judith Prakash in the Singapore High Court case of *Rajabali Jumabhoy v. Ameerli R Jumabhoy* [1997] 3 SLR 802 @ 847, followed this up with:

C

the abandonment of any proper relevant consideration of relevant facts; the fact of being rushed into a meeting; ignorance and the lack of detail explanation of the implication of the issues under consideration; *failure to exercise an independent discretion and the mere doing of what was thought a third party wanted cannot amount to the bona fide exercise of a director's discretion.* (emphasis added)

D

[44] Both of the cases cited above clearly state that 'for the best interest of a company' is for a majority to decide and also proper consideration of relevant facts in which a director must take into account to promote and advance the interest of the company.

E

[45] As a matter of law, a director is required to take into account the shareholders' view. Therefore any sale of more than the 10% mandated by the shareholders especially a sale which results in PEB no longer being a subsidiary or the plaintiff losing its status as the single largest and controlling shareholder would have required shareholders' approval, which they failed to do. The learned High Court Judge at p. 143 of the Rekod Rayuan stated that:

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155. A further announcement in relation to the Third Divestment was made on 15 December 2009 to provide additional information. In this detailed announcement, details were provided in respect of the utilisation of the sale consideration, the valuation report and the pricing of the disposed shares, the original cost of investment, financial information in relation to PEB, details pertaining to the purchaser, the rationale for the divestment which was to pare down borrowings and gearing etc. *It was clarified that no approval from the shareholders was required. It concluded by stipulating that the Board of the Plaintiff, after careful deliberation, was of the opinion that the Third Divestment was in the best interests of the Plaintiff.* (emphasis added)

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- A [46] With regards to s. 132(1) of the CA it is settled law that the duty to act honestly required by statute includes the duty to act in the best interest of the company. The test which the court has applied in determining whether directors have acted in breach of s. 132(1) of the CA is an objective one, in that in the absence of separate consideration “whether an honest and intelligent man in position of a director of a company concern could, in the whole of material circumstances have reasonably believed that the transaction were for the benefit of the company”. We refer to the case *Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1994] 3 SLR (R) 1064, at p. 1077 to 1078 where it set out the test to “act in the best interest of the company”:
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- C We were referred to the decision of Pennycuik J in *Charterbridge Corporation Ltd v. Lloyds Bank Ltd* [1970] 2 All ER 1185. There, the plaintiffs sought a declaration that a legal charge and a guarantee given by a company known as Castleford to secure the debts of another company, Pomeroy, were *ultra vires* as being outside the powers of Castleford. The two companies were part of the same group of companies and had
- D common directors. The basis of the claim was two-fold, firstly, that it was *ultra vires* Castleford, ie outside the corporate powers, to give the guarantee and legal charge, and, secondly, that the charge and guarantee were created for purposes not for the benefit of Castleford. The learned judge decided that Castleford was carrying out the purposes authorised by its memorandum and that the transactions were effected pursuant to the express power conferred by the memorandum and were not *ultra vires*.
- E He then proceeded further and said, at 74:
- F That is sufficient to dispose of the action: but in case I am wrong on my view of the law, I must proceed to express a conclusion upon the contention that in creating the guarantee and legal charge, the directors were not acting with a view to the benefit of Castleford. That is a question of fact, and the burden of proof lies on the plaintiff company. As I have already found, the directors of Castleford looked to the benefit of the group as a whole and did not give separate consideration to the benefit of Castleford. Mr Goulding contended that in the absence of separate consideration, they must, *ipso facto*, be treated as not having acted with a view to the benefit of Castleford. That is, I think, an unduly stringent test and would lead to really absurd results, ie unless the directors of a company addressed their minds specifically to the interest of the company in connection with each particular transaction, that transaction would be *ultra vires* and void, notwithstanding that the transaction might be beneficial to the company. Mr Bagnall for the bank contended that it is sufficient that the directors of Castleford looked to the benefit of the group as a whole. Equally, I reject that contention. Each company in the group is a separate legal entity and the directors of a particular company are not entitled to sacrifice the interest of that company. This becomes apparent when one considers the case where the particular company had separate
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- I creditors. The proper test, I think, in the absence of actual separate

consideration, must be whether an honest and intelligent man in the position of a director of the company concerned, could, in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company.

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Counsel for the appellants relied on this *dicta* and submitted that the circumstances here were not such as to lead to an inference of dishonesty on the part of the directors of the respondents, but were such that a reasonable man could have inferred that the transactions were entered into *bona fide* by the directors in the interests of the respondents. He contended that as the directors of the respondents were also the directors of City Carton, they had considered the group as an economic entity and therefore acted for the benefit of the group as a whole. At the same time, he submitted that the directors would have reasonably regarded the equity participation of the appellants as beneficial to the respondents. We accepted this submission. *We were of the opinion that an honest and intelligent man in the position of the directors, taking an objective view, could reasonably have concluded that the transactions were in the interests of the respondents.* There was clearly no evidence that the directors of the respondents had acted in breach of their duties to the respondents.

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We have dealt with the commercial purpose and reasons of the transactions and it is unnecessary for us to repeat them here. Suffice it here to say that the decision to purchase the debts in return for the appellants subscribing for the shares and advancing the loan was a management decision taken by the directors which turned out, in retrospect, to be a poor decision. It did not appear to us that this decision was not arrived at *bona fide*. In this respect, we found most apposite the following passage from the speech of Lord Wilberforce in *Howard Smith Ltd v. Ampol Petroleum Ltd* [1974] AC 821 at 832: [1974] All ER 1126:

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Their Lordships accept that such a matter as the raising of finance is one of management, within the responsibility of the directors: they accept that it would be wrong for the court to substitute its opinion for that of the management, or indeed to question the correctness of the management decision on such a question, if bona fide arrived at. There is no appeal on merits from management decisions to courts of law: nor will courts assume to act as a kind of supervisory board over decisions within the powers of management honestly arrived at. (emphasis added)

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[47] In our present case, the learned judge should have examined the conduct of the board of directors to determine whether they had satisfied the duty imposed on them in law in terms of their conduct that has been referred to in this case. We are of the view the board of the directors had failed to give consideration to the following facts:

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- a) To consider and take into account that the Second and Third Divestment of shares in PEB led to the plaintiff ceasing to be the majority shareholder of PEB, which was a loss of substantial income for the plaintiff.

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- A b) To weigh the need to raise funds by sale of these PEB shares would not improve (at all) the liquidity position of the plaintiff. All it did was to settle the bond holders. On the other hand the plaintiff had lost a valuable investment in PEB as the plaintiff no longer controlled PEB.
- B c) At the end of the day the beneficiary of the scheme referred to the aforesaid was Shorefield Resources which was linked to the first defendant through Dato' Bustari.

C In our view these are the factors that should have been considered by the court before it could hold that all these were done in the best interest of the plaintiff. To our mind, failure to do so, constitutes a misdirection in law and fact on the part of the learned trial judge which warrants appellate intervention.

D [48] We have given due consideration to the cross appeal of the first defendant and we are in agreement with the learned trial judge and the view expressed in para. 491 of her grounds of judgment at p. 223. We therefore accordingly dismissed the cross appeal with costs.

Findings

Accordingly, we hereby find as follows:

- E 1. The appeal against the first, second and third defendants is allowed with costs.
2. Order in terms of prayers 104.1, 104.2, 104.6, 104.7 and 104.10 of the statement of claim.
- F 3. The appeal against the fourth defendant is dismissed with costs.
4. In relation to the first defendant's cross appeal, the same is dismissed with costs.

Costs

- G After hearing parties on the issue of costs, and after due deliberation, we ordered:
- (a) The first, second and third defendants to each pay costs to the plaintiff in the sum of RM50,000;
- H (b) The plaintiff to pay costs in the sum of RM50,000 to the fourth defendant;
- (c) The first defendant to pay the plaintiff a sum of RM15,000 costs for the dismissal of the first defendant's cross appeal.

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